MISCELLANEOUS ORDERS

In re: STEW LEONARD'S.
98 AMA Docket No. M 1-1.
Order Denying Interlocutory Appeals filed December 4, 1998.

Interlocutory appeal — Premature appeal — Intervention.

The Judicial Officer denied interlocutory appeals from a ruling by Administrative Law Judge Dorothea A. Baker (ALJ) denying motions to consolidate and striking answers, on the ground that interlocutory appeals are not permitted under the Rules of Practice.

Donald A. Tracy, for Respondent.
James A. Wade, Hartford, Connecticut, for Petitioner.
Sydney Berde, St. Paul, Minnesota, for Agri-Mark, Inc.
John Vetne, Newburyport, Massachusetts, for New England Dairies, Inc.
Ruling issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Stew Leonard's [hereinafter Petitioner] instituted this proceeding on February 17, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner: (1) contends that a February 6, 1998, determination by the Market Administrator for the New England Milk Marketing Order that Petitioner is not a producer-handler under 7 C.F.R. § 1001.10, is not in accordance with law (Pet. ¶¶ 3, 15); and (2) requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner is not required to comply with "requirements of a handler under federal statutes, regulations, and milk orders" (Pet. at 5).

On April 24, 1998, the Administrator of the Agricultural Marketing Service [hereinafter Respondent] filed an Answer: (1) denying the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Answer ¶¶ 3, 9); and (2) stating that the Petition fails to state a claim upon which relief can be

granted (Answer at 3).[1]

On June 8, 1998, Agri-Mark, Inc., and the National Milk Producers Federation filed Motion of Agri-Mark, Inc., and National Milk Producers Federation for Leave to Participate in the Above Captioned Proceeding [hereinafter Motion to Intervene], in which Agri-Mark, Inc., and the National Milk Producers Federation requested an order granting them leave to participate in oral argument and to file a brief in this proceeding, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57).[2] On June 29, 1998, Respondent filed Respondents [sic] Reply to Motion of Agri-Mark and National Milk Producers Federation to Participate in the Proceeding; and Status Report [hereinafter Respondent's Reply] stating that Respondent takes no position with respect to Agri-Mark, Inc.'s and National Milk Producers Federation's request to file briefs, but "would oppose any motion by a non-party otherwise to appear or act as a party at an evidentiary hearing or any other aspect of this case" (Respondent's Reply at 1).

On July 9, 1998, the ALJ granted the Motion to Intervene "to the extent that [Agri-Mark, Inc., and the National Milk Producers Federation] may file briefs"

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[1]On August 12, 1998, Petitioner filed Motion to Amend Petition Filed Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Motion to Amend Petition] and Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Amended Petition]. The Amended Petition states that the Market Administrator's "February 6, 1998 letter, and the continuing refusal to confirm Stew Leonard's status as a producer-handler are not in accordance with law" (Amended Pet. ¶ 19) and requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner "is no longer required to file handler reports and comply with all other requirements of a handler under federal statutes, regulations, and milk orders" (Amended Pet. at 5-6). On August 21, 1998, Respondent filed Respondent's Reply to Motion to Amend Petition and Answer to Amended Petition [hereinafter Amended Answer]. The Amended Answer: (1) states that Respondent does not object to Petitioner's Motion to Amend Petition (Amended Answer at 1); (2) denies the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Amended Answer ¶¶ 3, 9); and (3) states that the Amended Petition fails to state a claim upon which relief can be granted (Amended Answer at 3). On September 10, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] granted Petitioner's Motion to Amend Petition (Ruling on Motion to Amend).

[2]Section 900.57 of the Rules of Practice provides:

§ 900.57 Intervention.

Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

7 C.F.R. § 900.57.

(Ruling on Motion for Leave to Participate in Proceeding).

On September 1, 1998, Agri-Mark, Inc., filed: (1) Petition of Agri-Mark, Inc., pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) in *In re Agri-Mark, Inc.*, 98 AMA Docket No. M 1-2; (2) Motion of Agri-Mark, Inc. For an Order For Consolidated Hearing on Its Petition [hereinafter Agri-Mark, Inc.'s Motion to Consolidate], in which Agri-Mark, Inc., requested consolidation of this proceeding and *In re Agri-Mark, Inc.*, 98 AMA Docket No. M 1-2; and (3) Answer of Agri-Mark, Inc., in this proceeding.

On September 9, 1998, Petitioner filed Motion to Strike Answer of Agri-Mark, Inc., in which Petitioner requested that the ALJ strike the Answer of Agri-Mark, Inc., from the record and Petitioner's Objection to Agrimark's [sic] Motion to Consolidate, in which Petitioner requested that the ALJ deny Agri-Mark, Inc.'s Motion to Consolidate. On September 17, 1998, Respondent filed Respondent's Motion to Strike Agri-Mark, Inc.'s "Answer"; and Respondent's Opposition to Agri-Mark, Inc.'s Motion for Consolidated Hearing, in which Respondent requested that the ALJ deny Agri-Mark, Inc.'s Motion to Consolidate and strike Answer of Agri-Mark, Inc. On September 21, 1998, Agri-Mark, Inc., filed Response of Agri-Mark, Inc. To Petitioner's Objection for Consolidated Hearing. On September 23, 1998, Petitioner filed Petitioner's Memorandum in Support of Its Objection to Agri-Mark's Motion to Consolidate.

On September 14, 1998, New England Dairies, Inc., filed: (1) a petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3; (2) an answer [hereinafter New England Dairies, Inc.'s Answer] to the Amended Petition in this proceeding; and (3) New England Dairies, Inc., Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter New England Dairies, Inc.'s Petition to Consolidate], in which New England Dairies, Inc., requested consolidation of this proceeding and *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3, and intervention in this proceeding.

On September 22, 1998, the ALJ: (1) struck Answer of Agri-Mark, Inc.; (2) denied Agri-Mark, Inc.'s Motion to Consolidate; (3) struck New England Dairies, Inc.'s Answer; (4) denied New England Dairies, Inc.'s Petition to Consolidate; and (5) permitted New England Dairies, Inc., to participate in this proceeding "to the limited extent of filing briefs" (Rulings on Respondent's Motion to Strike Agri-Mark, Inc.'s, "Answer" and Agri-Mark, Inc.'s, Motion for Consolidated Hearing; Rulings on New England Dairies, Inc.'s "Answer" to Amended Petition of Stew Leonard's [Petitioner herein] and Petition to Intervene and Consolidate for Hearing [hereinafter Rulings Denying Motions to Consolidate and Striking Answers] at 2).

On October 13, 1998, and October 26, 1998, respectively, Agri-Mark, Inc., and

New England Dairies, Inc., appealed the ALJ's Rulings Denying Motions to Consolidate and Striking Answers[3] to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[4] On November 4, 1998, Petitioner filed Response of Stew Leonard's in Opposition to the Appeal to the Judicial Officer of Agri-Mark, Inc. On November 9, 1998, Respondent filed Respondent's Reply to Appeal of Agri-Mark and New England Dairies. On November 17, 1998, Agri-Mark, Inc., filed Reply of Agri-Mark, Inc. to Stew Leonard's Response in Opposition to Appeal to Judicial Officer. On November 23, 1998, Petitioner filed Response of Stew Leonard's in Opposition to the Appeal to the Judicial Officer of New England Dairies, Inc., and on November 24, 1998, the Hearing Clerk referred the case to the Judicial Officer for decision.

Section 900.65(a) of the Rules of Practice limits the time during which a party may file an appeal to a 30-day period *after* service of the *judge's decision*, as follows:

> **§ 900.65 Appeals to Secretary: Transmittal of record.**
>
> (a) *Filing of appeal.* Any party who disagrees with a judge's decision or any part thereof, may appeal the decision to the Secretary by transmitting an appeal petition to the hearing clerk within 30 days after service of said decision upon said party.

7 C.F.R. § 900.65(a).

Section 900.51(o) of the Rules of Practice defines the word *decision*, as follows:

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[3]New England Dairies, Inc., filed its appeal of the ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3. The ALJ did not issue Rulings Denying Motions to Consolidate and Striking Answers in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3. I infer that New England Dairies, Inc., intends to appeal the ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers issued in this proceeding.

[4]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the [AMAA] shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(o) The term *decision* means the judge's initial decision in proceedings subject to 5 U.S.C. 556 and 557, and includes the judge's (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion as well as the reasons or basis thereof, (2) order, and (3) rules [sic] on findings, conclusions and orders submitted by the parties.

7 C.F.R. § 900.51(o).

The ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers is not a *decision*, as defined in section 900.51(o) of the Rules of Practice (7 C.F.R. § 900.51(o)), but rather is an interlocutory ruling. Thus, the October 13, 1998, Appeal of Agri-Mark, Inc., to the Judicial Officer [hereinafter Agri-Mark, Inc.'s Appeal Petition] and the October 26, 1998, Appeal of New England Dairies, Inc., to the Judicial Officer [hereinafter New England Dairies, Inc.'s Appeal Petition] are interlocutory appeals, which are not permitted under the Rules of Practice.[5]

Moreover, Agri-Mark, Inc.'s Appeal Petition and New England Dairies, Inc.'s Appeal Petition, both of which were filed prior to the issuance of a decision by the ALJ, must be rejected as premature.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

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[5]*See In re Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1062, 1063 (1982) (stating that interlocutory appeals are not permitted under the Rules of Practice) (Order Denying Appeals); *In re H. Naraghi*, 40 Agric. Dec. 1687 (1981) (dismissing the respondent's interlocutory appeal to the Judicial Officer relating to an administrative law judge's grant of the petitioner's request for the taking of oral depositions for discovery purposes) (Order Dismissing Interlocutory Appeal).

Rule 4. Appeal as of Right—When Taken

(a) *Appeal in a Civil Case.—*

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

Fed. R. App. P. 4(a)(1), *reprinted in* 28 U.S.C. app. at 591 (1994).

The notes of the Advisory Committee on Appellate Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. . . .

Fed. R. App. P. 4(a)(1) advisory committee's note (1979 Amendment).[6]

For the foregoing reasons, Agri-Mark, Inc.'s Appeal Petition and New England Dairies, Inc.'s Appeal Petition are denied.

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[6]*Accord Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (stating that a notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788, 792 (1st Cir. 1990) (stating that a premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798, 799 (3d Cir. 1989) (stating that the appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

In re: AGRI-MARK, INC.
98 AMA Docket No. M 1-2.
Dismissal of Petition filed December 15, 1998.

Donald A. Tracy, for Respondent.
Sydney Berde, St. Paul, Minnesota, for Petitioner.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Premised upon a consideration of the pleadings and entire record herein, including the reasons set forth by Respondent in its filing, dated October 30, 1998, entitled: "Respondent's Motion to Dismiss the Petition and to Have the Case Assigned to Judge Baker" the Petition filed by Agri-Mark, Inc. on September 1, 1998, and, as amended by the Amended Petition filed September 21, 1998, is hereby Dismissed.

Copies hereof shall be served upon the parties.

In re: NEW ENGLAND DAIRIES, INC.
98 AMA Docket No. M 1-3.
Dismissal of Petition filed December 15, 1998.

Donald A. Tracy, for Respondent.
Sydney Berde, St. Paul, Minnesota, for Petitioner.
Order issued by Dorothea A. Baker, Administrative Law Judge.

The following Order is issued after a consideration of the record as a whole, including Respondent's Motion to Dismiss the Petition, filed October 30, 1998. Respondent has set forth compelling reasons why the Petitioner herein is attempting to intervene in another 15A proceeding and has filed an inappropriate baseless Petition and one which is not in conformity with the law and regulations, all as more fully set forth by Respondent in its Motion to Dismiss.

New England Dairies, Inc.'s Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608(c)(15)(A); and, its Affirmative Claims of Intervenor/Petitioner filed September 14, 1998, are Dismissed.

Copies hereof shall be served upon the parties.

In re: PAT KNIGHT.
A.Q. Docket No. 98-0010.
Order Dismissing Complaint filed September 15, 1998.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on August 4, 1998, be dismissed.

In re: PETER A. LANG, d/b/a SAFARI WEST.
AWA Docket No. 96-0002.
Stay Order filed July 1, 1998.

Colleen A. Carroll, for Complainant.
Respondent, pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 13, 1998, I issued a Decision and Order: (1) concluding that Peter A. Lang, d/b/a Safari West [hereinafter Respondent], violated section 2.131(a)(1) of the regulations (9 C.F.R. § 2.131(a)(1)) issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159); (2) assessing Respondent a civil penalty of $1,500; and (3) ordering Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible, in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 16, 43-44 (Jan. 13, 1998). On March 12, 1998, Respondent filed a petition for reconsideration, which I denied. *In re Peter A. Lang*, 57 Agric. Dec. ___ (May 13, 1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondent filed a Motion for Stay pending the outcome of proceedings for judicial review, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay. On June 30, 1998, counsel for the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed the Office of the Judicial Officer, by telephone, that Complainant does not oppose Respondent's Motion for Stay.

Respondent's Motion for Stay is granted. The Order issued in this proceeding on January 13, 1998, *In re Peter A. Lang*, 57 Agric. Dec. ___ (Jan. 13, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: SOUTH CALHOUN FARM, INC.
AWA Docket No. 95-0042
Order Dismissing Complaint filed July 20, 1998.

Robert A. Ertman, for Complainant.
Robert A. Gilder, Southaven, Mississippi, for Respondent
Order Dismissing Complaint issued by James W. Hunt, Administrative Law Judge.

The parties joint "Stipulation and Motion to Dismiss," filed July 10, 1998, is granted. It is ordered that the complaint and order to show cause filed herein on April 11, 1995, be dismissed without prejudice as moot.

In re: STEVEN M. SAMEK AND TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Ruling Denying Steven M. Samek's Motion for Assistance With Appeal filed August 20, 1998.

Colleen A. Carroll, for Complainant.
Respondent, pro se.
Default Decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on

October 18, 1996.

The Complaint alleges that Steven M. Samek and Trina JoAnn Samek violated the Animal Welfare Act and the Regulations and Standards.[1] Mr. Kent A. Permentier, a senior investigator with the Animal and Plant Health Inspection Service, personally served a copy of the Complaint on Steven M. Samek [hereinafter Respondent] on February 21, 1997 (United States Department of Agriculture, Certificate of Personal Service of Kent A. Permentier, filed June 25, 1997).

Respondent failed to answer the Complaint within 20 days as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On August 22, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Proposed Decision and Order Upon Admission of Facts by Reason of Default as to Steven M. Samek [hereinafter Default Decision] in which the Chief ALJ found that Respondent violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; assessed a civil penalty of $15,000 against Respondent; suspended Respondent's Animal Welfare Act license for 30 days; and ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On April 6, 1998, Respondent was served with the Default Decision, and on April 10, 1998, Respondent filed a motion requesting appointment of a public defender to appeal the Default Decision. On May 4, 1998, Complainant filed Complainant's Response to Appeal of Decision and Order, and on May 6, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's motion for appointment of a public defender. On May 12, 1998, I issued a Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek.

On May 19, 1998, Respondent filed a motion requesting that the Chief ALJ assist Respondent with Respondent's appeal of the Default Decision to the Judicial Officer [hereinafter Respondent's Motion for Assistance With Appeal]. Complainant made three requests for extensions of time to file a response to Respondent's Motion for Assistance With Appeal. I granted each of Complainant's

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[1]On March 26, 1998, Complainant filed a motion to dismiss the Complaint as to Trina JoAnn Samek (Motion to Dismiss Without Prejudice as to Trina JoAnn Samek), which Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] granted on March 31, 1998 (Dismissal of Complaint Against Trina JoAnn Samek).

requests for extension of time,[2] and Complainant's response to Respondent's Motion for Assistance With Appeal was due August 17, 1998.[3] Complainant failed to file any response to Respondent's Motion for Assistance With Appeal on or before August 17, 1998, and on August 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Assistance With Appeal.

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

> **§ 555. Ancillary matters**
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> . . . .
>
> (b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

5 U.S.C. § 555(b).

However, a respondent who desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel.[4] Further, a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings, such as those conducted under the Animal Welfare Act.[5]

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[2]Informal Order, filed June 11, 1998; Informal Order, filed July 8, 1998; Informal Order, filed July 31, 1998.

[3]*See* Informal Order, filed July 31, 1998 (granting Complainant an extension of time to August 17, 1998, to file a response to Respondent's Motion for Assistance With Appeal).

[4]*In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 8 (Aug. 17, 1998).

[5]*See generally Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating that there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating that it is well settled that deportation hearings are in the nature of civil proceedings and that aliens therefore have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating that a

(continued...)

Moreover, the Act of September 6, 1966, as amended by the Act of March 27, 1978, provides that administrative law judges may not perform duties inconsistent with their duties and responsibilities as administrative law judges, as follows:

§ 3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. *Administrative law judges* shall be assigned to cases in rotation so far as practicable, and *may not perform duties inconsistent with their duties and responsibilities as administrative law judges.*

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[5](...continued)
deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating that because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating that 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating that, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), *cert. denied*, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating that petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2nd Cir.) (stating that in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), *cert. denied*, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating that the Secretary of Health and Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 8-9 (Aug. 17, 1998) (stating that a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those conducted under the Swine Health Protection Act); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating that a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984).

5 U.S.C. § 3105 (emphasis added).

One of the primary duties of the Chief ALJ is to act as an impartial decisionmaker in the United States Department of Agriculture's adjudicatory proceedings conducted in accordance with 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.27). While the Chief ALJ has completed his duties with respect to the instant proceeding (barring an order remanding the proceeding to the Chief ALJ), I find that the Chief ALJ's representation of Respondent on appeal of the Chief ALJ's Default Decision to the Judicial Officer would be inconsistent with the Chief ALJ's duty and responsibility to act as an impartial decisionmaker in the instant proceeding.

Therefore, Respondent's motion requesting that the Chief ALJ assist Respondent with Respondent's appeal of the Default Decision to the Judicial Officer, is denied.

In re: MARILYN SHEPHERD.
AWA Docket No. 96-0084.
Order Denying Petition for Reconsideration filed September 15, 1998.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Sharlene A. Deskins, for Complainant.
Respondent, pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on September 24, 1996.

The Complaint alleges that Marilyn Shepherd [hereinafter Respondent] willfully violated the Animal Welfare Act and the Regulations and Standards by failing to properly identify animals and by failing to comply with the Regulations and Standards relating to the care and housing of animals. On October 17, 1996,

Respondent filed an Answer denying the material allegations of the Complaint, and on October 24, 1996, Respondent filed a Supplemental Answer, requesting a hearing.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on July 16, 1997, in Springfield, Missouri. Sharlene Deskins, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself. On September 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof. On September 15, 1997, Respondent filed a Brief. On October 8, 1997, Respondent filed a response to Complainant's Brief.

On October 30, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] assessing Respondent a civil penalty of $600 and ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards (Initial Decision and Order at 22).

On December 1, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On January 14, 1998, Complainant filed Complainant's Appeal Petition, Brief in Support of Its Appeal Petition and Opposition to the Respondent's Appeal Petition. On March 24, 1998, Respondent filed a response to Complainant's Appeal. On March 26, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On June 26, 1998, I issued a Decision and Order: (1) concluding that Respondent violated the Animal Welfare Act (7 U.S.C. §§ 2131-2159) and the following sections of the Regulations and Standards: 9 C.F.R. §§ 2.40; 2.50; 2.100(a); 3.1(a); 3.1(c)(1)(i); 3.1(f); 3.4(b); 3.6; 3.9(b); 3.10; and 3.11(a); (2) assessing Respondent a civil penalty of $2,000; (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) suspending Respondent's license under the Animal Welfare Act for a period of 7 days, or if Respondent is not licensed, disqualifying Respondent from becoming licensed under the Animal Welfare Act for a period of 7 days. *In re Marilyn Shepherd*, 57 Agric. Dec. ___, slip op. at 38, 60-62 (June 26, 1998). On

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

July 6, 1998, Respondent was served with a copy of the June 26, 1998, Decision and Order and a letter dated June 29, 1998, from the Hearing Clerk.[2]

On July 17, 1998, 11 days after Respondent was served with the Decision and Order, Respondent filed Request Petition for Reconsideration of the Judicial Officers [sic] Decision [hereinafter Petition for Reconsideration]. On August 7, 1998, Complainant filed Complainant's Opposition to the Respondent's "Request Petition for Reconsideration of Judicial Officer Decision," and on August 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 26, 1998, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

The letter dated June 29, 1998, from the Hearing Clerk, expressly advises Respondent of the time for filing a petition for reconsideration, as follows:

> CERTIFIED RECEIPT REQUESTED
> June 29, 1998
>
> Marilyn Shepherd
> Route 2, Box 819
> Ava, MO 65608

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[2]Domestic Return Receipt for Article Number P 368 426 977.

Dear Ms. Shepherd:

Subject: In re: Marilyn Shepherd-Respondent
AWA Docket No. 96-0084

Enclosed is a date-stamped copy of the Decision and Order issued by the Judicial Officer on the Secretary's behalf in the above-captioned proceeding.

Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute. If you are not currently represented by an attorney, you may choose to seek legal advice regarding an appeal.

Prior to filing an appeal, you may file a petition for reconsideration of the Judicial Officer's decision within **10 days** of service of the decision. An original and three copies of the petition for reconsideration must be filed with this office.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

June 29, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Shepherd (emphasis in original).

Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after service of the Decision and Order, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[3]

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[3]*See In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after respondents were served with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after respondent was served with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after (continued...)

Since Respondent's Petition for Reconsideration was not timely filed, the Decision and Order filed June 26, 1998, was not stayed in accordance with section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)). Therefore, the effective dates of the provisions of the Order in the June 26, 1998, Decision and Order, are not changed.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's Petition for Reconsideration is denied.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Denying in Part and Granting in Part Petition for Reconsideration filed July 7, 1998.

Willful — Substantial evidence — Sanction.

The Judicial Officer denied in part and granted in part Respondent's Petition for Reconsideration. Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful violations. Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats do not constitute violations of 9 C.F.R. § 2.75(a)(1); however, Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of persons from whom he acquired animals are violations of 9 C.F.R. § 2.75(a)(1). "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The record contains substantial evidence of Respondent's willful violations of 7 U.S.C. § 2140 and 9 C.F.R.

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[3](...continued)
respondent was served with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after respondent was served with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after service of the decision and order on respondent); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after service of the decision and order on respondent); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing petition for reconsideration because it was not filed within 10 days after service of the decision and order on respondent); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after service of the decision and order on respondent).

§§ 2.75(a)(1), 2.100, 2.132, and 3.1(f). The facts establish that a 10-day suspension of Respondent's Animal Welfare Act license and the assessment of a $5,350 civil penalty against Respondent are warranted.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 17, 1995.

The Complaint alleges that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], willfully violated the Animal Welfare Act and the Regulations and Standards by failing to keep complete records, by acquiring *random source* dogs from prohibited sources, and by failing to comply with the Regulations and Standards relating to the care, transportation, and handling of animals. On March 16, 1995, Respondent filed an Answer denying the material allegations of the Complaint; and on May 16, 1995, Respondent filed an Amended Answer containing affirmative defenses.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on October 1 and 2, 1996, in Memphis, Tennessee. Robert A. Ertman, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Robert G. Gilder, Esq., of Southaven, Mississippi, and Kevin N. King, Esq., of Hardy, Arkansas, represented Respondent.[1] On January 31, 1997, Respondent filed Proposed Findings of Fact, Proposed Conclusions of Law, and Memorandum in Lieu of Oral Closing Argument. On February 3, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof.

On April 9, 1997, the ALJ issued an Initial Decision and Order assessing Respondent a civil penalty of $5,000 and ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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[1]On April 10, 1998, Jefferson D. Gilder, Esq., of Southaven, Mississippi, entered an appearance on behalf of Respondent (Entry of Appearance, filed April 10, 1998).

On May 1, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On May 30, 1997, Respondent filed Respondent's Response to Appeal Petition. On June 9, 1997, Complainant filed Complainant's Memorandum in Support of Appeal. On July 30, 1997, Respondent refiled Respondent's May 30, 1997, Response to Appeal Petition, together with Respondent's Brief in Opposition to the Complainant's Appeal of Initial Decision and Order. On August 27, 1997, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On March 20, 1998, I issued a Decision and Order: (1) assessing Respondent a civil penalty of $9,250; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) suspending Respondent's Animal Welfare Act license for 14 days. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 71-72 (Mar. 20, 1998).

On April 10, 1998, Respondent filed Petition for Reconsideration and requested an extension of time within which to file a brief in support of his Petition for Reconsideration. On May 11, 1998, Respondent filed Respondent's Memorandum in Support of Petition to Reconsider [hereinafter Petition for Reconsideration]. On June 29, 1998, Complainant filed Complainant's Response to Petition for Reconsideration, and on June 30, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 20, 1998.

Complainant's Response to Petition for Reconsideration was filed late. Therefore, I have not considered Complainant's Response to Petition for Reconsideration, and Complainant's Response to Petition for Reconsideration forms no part of the record of this proceeding.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARD

7 U.S.C.:

TITLE 7—AGRICULTURE

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use

as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) *Civil penalties for violation of any section, etc.*; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2131, 2132(f), 2140, 2149(a), (b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general

usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

Random source means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer. . . . The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.132 Procurement of random source dogs and cats, dealers.

(a) A class "B" dealer may obtain live random source dogs and cats only from:

(1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;

(2) State, county, or city owned and operated animal pounds or shelters; and

(3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

(b) A class "B" dealer shall not obtain live random source dogs and cats from individuals who have not bred and raised the dogs and cats on their own premises.

(c) Live nonrandom source dogs and cats may be obtained from persons who have bred and raised the dogs and cats on their own premises, such as hobby breeders.

(d) No person shall obtain live random source dogs or cats by use of false pretenses, misrepresentation, or deception.

(e) Any dealer, exhibitor, research facility, carrier, or intermediate handler who also operates a private or contract animal pound or shelter shall comply with the following:

(1) The animal pound or shelter shall be located on premises that are physically separated from the licensed or registered facility. The animal housing facility of the pound or shelter shall not be adjacent to the licensed or registered facility.

(2) Accurate and complete records shall be separately maintained by the licensee or registrant and by the pound or shelter. The records shall be in accordance with §§ 2.75 and 2.76, unless the animals are lost or stray. If the animals are lost or stray, the pound or shelter records shall provide:

(i) An accurate description of the animal;

(ii) How, where, from whom, and when the dog or cat was obtained;

(iii) How long the dog or cat was held by the pound or shelter before being transferred to the dealer; and

(iv) The date the dog or cat was transferred to the dealer.

(3) Any dealer who obtains or acquires a live random source dog or cat from a private or contract pound or shelter, including a pound or shelter he or she operates, shall hold the dog or cat for a period of at least 10 full days, not including the day of acquisition, excluding time in transit, after acquiring the animal, and otherwise in accordance with § 2.101.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and the animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

9 C.F.R. §§ 1.1; 2.75(a)(1), .100(a), .132; 3.1(f) (footnote omitted).

Respondent raises seven issues in his Petition for Reconsideration. First, Respondent contends that the Judicial Officer's conclusion that Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1), 2.100, and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100, .132), and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) were willful, is error (Pet. for Recons. at 2, 6, 12-14).

I disagree with Respondent's contention that his violations of the Animal Welfare Act and the Regulations and Standards were not willful. The basis for my conclusion that Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful are fully explicated in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 24-25, 48-56.

Second, Respondent contends that:

> The Judicial Officer quotes in support of its records keeping facts "I don't understand how I can be asked to do anymore than that[]" (Tr. 269) which deals solely with random source bred and raised questions and not driver[]s['] licenses. (Order p. 50).

Pet. for Recons. at 5.

I agree with Respondent's point that Respondent's testimony at Tr. 269 ll. 5-6 was in response to a question relating to Respondent's acquisition of random source dogs from unauthorized sources and was not in response to a question regarding Respondent's failure to fully and correctly maintain records. Therefore, the following in *In re C.C. Baird, supra*, slip op. at 50, is deleted:

> Respondent expressed frustration that he would be expected to do more than just take down the information, testifying at one point that "I don't understand how I can be asked to do anymore than that." (Tr. 269.)

However, this error is harmless, and it does not cause me to change the findings of fact, conclusions of law, or the sanction imposed in *In re C.C. Baird, supra*.

Third, Respondent contends that:

> The overwhelming proof in this case and uncontradicted proof is that the Respondent did request to see drivers['] licenses of sellers. There is no requirement in the regulations clearly requiring inspection of the actual license of sellers nor clearly as to vehicle or drivers['] licenses of sellers could as easily be read to require that information of only purchasers read

literally.

Pet. for Recons. at 5.

I disagree with Respondent's contention that the evidence supports a finding that he examined the driver's license of each person from whom he purchased a dog or cat; however, I agree with Respondent that there is no requirement in the Regulations that he inspect the driver's license of each person from whom he acquires a dog or cat.

Section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) requires that each dealer make, keep, and maintain records or forms which fully and correctly disclose, *inter alia*, the name and address of the person from whom a dealer acquires a dog or cat and, if the person from whom a dog or cat is acquired is not registered or licensed under the Animal Welfare Act, the vehicle license number and state and the driver's license number and state of the person from whom the dog or cat is acquired. Considering the circumstances in this proceeding, particularly that some persons from whom Respondent acquired animals lied or were otherwise deceptive about their drivers' licenses and addresses, I found that, in order to comply with the recordkeeping requirements in section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), Respondent was required to verify the information he received by looking at the sellers' drivers' licenses. *In re C.C. Baird, supra*, slip op. at 20. However, I did not find that Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats constitute violations of the Regulations. Instead, I based my conclusion that Respondent willfully violated the recordkeeping provisions of the Animal Welfare Act (7 U.S.C. § 2140) and the recordkeeping requirements of the Regulations (9 C.F.R. § 2.75(a)(1)) on Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of at least 23 persons from whom he acquired animals. *In re C.C. Baird, supra*, slip op. at 26.

Fourth, Respondent contends that the findings of fact in the Decision and Order "[a]re [n]ot [s]upported [b]y [s]ubstantial [e]vidence" (Pet. for Recons. at 6).

Except with respect to the number of Respondent's violations of 9 C.F.R. § 2.132, as discussed in this Order Denying in Part and Granting in Part Petition for Reconsideration, *infra*, I disagree with Respondent's contention that the findings of fact in the Decision and Order, *In re C.C. Baird, supra*, slip op. at 25-26, are not supported by substantial evidence.

The Administrative Procedure Act provides, with respect to substantial evidence, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*.

5 U.S.C. § 556(d) (emphasis added).

"Substantial evidence" is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The record contains substantial evidence of Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1), 2.100, and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100, .132), and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), which substantial evidence is fully discussed in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 12-25, 28-41, 47-61.

Fifth, Respondent contends that in light of Complainant's contention that Respondent acquired a minimum of 29 random source dogs from unauthorized sources, it was error for the Judicial Officer to conclude that Respondent acquired a minimum of 67 random source dogs from unauthorized sources (Pet. for Recons. at 8-9).

I based my finding that Respondent acquired a minimum of 67 dogs from unauthorized sources on signed affidavits from 11 persons who sold random source

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[3]*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Griffith v. Callahan*, 138 F.3d 1150, 1152 (7th Cir. 1998); *Beverly Enterprises, Inc. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1998); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91 (2d Cir. 1997); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995); *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1002-03 (8th Cir. 1994); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 144 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Minnesota Mining & Mfg., Co. v. Coe*, 118 F.2d 593, 594 (D.C. Cir. 1940), *cert. denied*, 314 U.S. 624 (1942); *NLRB v. Arcade-Sunshine Co.*, 118 F.2d 49, 51 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 567 (1941); *NLRB v. Empire Furniture Corp.*, 107 F.2d 92, 95 (6th Cir. 1939).

animals to Respondent (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218). These affidavits state that the affiants sold a minimum of 67 animals to Respondent. However, on further examination of the affidavits, I find that the affiants do not state that all of the animals sold to Respondent were random source dogs. Therefore, I agree with Respondent that my conclusion in *In re C.C. Baird, supra*, that Respondent willfully acquired a minimum of 67 random source dogs from unauthorized sources, in violation of section 2.132 of the Regulations (9 C.F.R. § 2.132), is error. Instead, I find, based on a careful examination of the 11 signed affidavits (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218), that Respondent willfully acquired a minimum of 28 random source dogs from unauthorized sources, in violation of section 2.132 of the Regulations (9 C.F.R. § 2.132), as alleged in paragraph III of the Complaint.[4]

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[4]Complainant alleges that from approximately January 1992 to approximately May 1993, Respondent acquired random source dogs in willful violation of section 2.132 of the Regulations (9 C.F.R. § 2.132) (Compl. ¶ III). Mr. Virgil Belding states in his affidavit that in 1992 he sold 23 dogs to Respondent and that he (Mr. Belding) only raised some of the dogs (CX 152). Therefore, I find that Respondent acquired at least 1 random source dog from Mr. Belding, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Julius Waller states that in 1992 he sold 3 dogs to Respondent and that he (Mr. Waller) "obtained these dogs from trading for them at different dog swaps" (CX 163). Therefore, I find that Respondent acquired 3 random source dogs from Mr. Waller, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. William P. Hillis states that on various dates he sold a number of dogs to Respondent and that they were not all raised by Mr. Hillis on Mr. Hillis' premises (CX 171). Since Mr. Hillis did not state the date on which he sold dogs to Respondent, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Hillis during the period from approximately January 1992 to approximately May 1993, as alleged in paragraph III of the Complaint. Mr. Jack Coomer states that in 1992 he sold 13 dogs to Respondent and that he (Mr. Coomer) acquired these dogs "from different individuals sometimes I pay for them or trade for them for hunting purposes" (CX 175). Therefore, I find that Respondent acquired 13 random source dogs from Mr. Coomer, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Shelby Sellerc states that on various dates he sold about 3 dogs to Respondent and that they were not all raised by Mr. Sellerc on Mr. Sellerc's premises (CX 179). Since Mr. Sellerc did not state the date on which he sold dogs to Respondent, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Sellerc during the period from approximately January 1992 to approximately May 1993, as alleged in paragraph III of the Complaint. Mr. Harold Odell states that on various dates in 1992 and 1993 he sold an unknown number of "dogs/cats" to Respondent and that they were not all raised by Mr. Odell on Mr. Odell's premises (CX 187). Since Mr. Odell did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Odell, as alleged in paragraph III of the Complaint. Mr. Clinton Stevenson states that in 1992 he sold 8 dogs to Respondent and that "most of the . . . dogs were given to me" and "most came from neighbor farmers" (CX 192). Therefore, I find that Respondent acquired at least 5 random source dogs from Mr. Stevenson, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. James

(continued...)

The $9,250 civil penalty which I assessed against Respondent and the 14-day period during which I suspended Respondent's Animal Welfare Act license in *In re C.C. Baird, supra*, were based, in part, on the number of Respondent's violations. Since I now conclude that Respondent acquired a minimum of 28 random source dogs from unauthorized sources, rather than a minimum of 67 random source dogs from unauthorized sources, I am reducing the civil penalty assessed against Respondent from $9,250 to $5,350 and the period of suspension of Respondent's Animal Welfare Act license from 14 days to 10 days.

Sixth, Respondent contends that Dr. Gregory Gaj, an Animal and Plant Health Inspection Service inspector, who inspected Respondent's facility, willfully allowed and encouraged Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and sections 2.75(a)(1) and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a), .132) (Pet. for Recons. at 10-13).

The record contains no evidence to support Respondent's contention that Dr. Gaj encouraged Respondent to violate either the Animal Welfare Act or the Regulations and Standards. Moreover, there is no evidence to support Respondent's contention that Dr. Gaj allowed Respondent to violate the recordkeeping provisions of the Animal Welfare Act (7 U.S.C. § 2140) or the recordkeeping requirements in the Regulations (9 C.F.R. § 2.75(a)). However, as fully discussed in the Decision and Order, the record reveals that Dr. Gaj knew of Respondent's violations of the regulation concerning the procurement of random-source dogs and cats (9 C.F.R. § 2.132), and instead of citing Respondent for the

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[4](...continued)
Hendershott states that in January 1993 he sold 2 dogs to Respondent and that he (Mr. Hendershott) "obtained both of these dogs - one from Glen Morton a farmer down the road and the other from a dog trader Darrell at the Poplar Bluff dog swap" (CX 196). Therefore, I find that Respondent acquired 2 random source dogs from Mr. Hendershott, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Michael G. Seets states that in October 1993 he sold 5 mixed breed "dogs/cats" to Respondent and that he (Mr. Seets) acquired these dogs/cats "from different individuals from local area" (CX 198). Since Mr. Seets did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Seets, as alleged in paragraph III of the Complaint. Mr. Felix Blevis states that he sold "dogs/cats" to Respondent and that the dogs/cats were not all raised by Mr. Blevis on Mr. Blevis' premises (CX 211). Since Mr. Blevis did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Blevis, as alleged in paragraph III of the Complaint. Mr. Lee L. Tharp states that he sold 4 random source dogs to Respondent about May 1992 and sold 7 random source dogs to Respondent on three other occasions (CX 218). Therefore, I find that, during the period relevant to this proceeding, Respondent acquired 4 random source dogs from Mr. Tharp, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint.

violations or reporting the violations to his superiors, Dr. Gaj merely advised Respondent that Respondent would be held accountable if the random-source regulation was enforced in the future. Even if I found that Dr. Gaj's failure to cite Respondent for violations of 9 C.F.R. § 2.132 constitutes "allowing" Respondent to violate 9 C.F.R. § 2.132, Dr. Gaj's failure to cite Respondent for violations would not be material to the issue of whether Respondent violated 9 C.F.R. § 2.132. My determination that Dr. Gaj's failure to cite Respondent for violations of 9 C.F.R. § 2.132 is immaterial is fully discussed in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 16-17, 21-22, 52-55.

Seventh, Respondent contends that the facts establish that the 14-day suspension of his Animal Welfare Act license is not warranted and that the $5,000 civil penalty assessed against Respondent by the ALJ is "more than adequate" (Pet. for Recons. at 15).

Based on my conclusion that Respondent willfully acquired a minimum of 28 random source dogs from unauthorized sources, rather than a minimum of 67 random source dogs from unauthorized sources, I agree with Respondent's contention that the facts do not establish that a 14-day suspension of Respondent's Animal Welfare Act license and the assessment of a $9,250 civil penalty against Respondent are warranted. Instead, I find that a cease and desist order, a 10-day suspension of Respondent's Animal Welfare Act license, and the assessment of a $5,350 civil penalty against Respondent are warranted.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 20, 1998, *In re C.C. Baird, supra*, Respondent's Petition for Reconsideration is denied in part and granted in part.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[5]

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[5]*In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110-11 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797-98 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*,
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the March 20, 1998, Decision and Order. Since Respondent's Petition for Reconsideration is granted in part, the Order in the Decision and Order, filed March 20, 1998, is not reinstated.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and, in particular, shall cease and desist from:

A. Failing to make, keep, and maintain records which fully disclose all required information;

B. Acquiring random source dogs from unauthorized sources; and

C. Failing to make provision for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $5,350. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to: Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250-1417. Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 95-0017.

3. Respondent's Animal Welfare Act license is suspended for 10 days and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and

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[5](...continued)
56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 10-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 90th day after service of this Order on Respondent.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Stay Order filed December 17, 1998.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 20, 1998, I issued a Decision and Order: (1) concluding that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the Regulations and Standards issued under the Animal Welfare Act; (2) assessing Respondent a civil penalty of $9,250; (3) suspending Respondent's Animal Welfare Act license for 14 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. *In re C.C. Baird*, 57 Agric. Dec. 127, 149, 184-85 (1998). Respondent filed a timely petition for reconsideration which automatically stayed the March 20, 1998, Decision and Order. I issued an Order Denying in Part and Granting in Part Petition for Reconsideration, in which the Order issued March 20, 1998, was not reinstated and an Order (1) assessing Respondent a civil penalty of $5,350, (2) suspending Respondent's Animal Welfare Act license for 10 days, and (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, was issued. *In re C.C. Baird*, 57 Agric. Dec., slip op. 18-21 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.).

On December 16, 1998, Respondent filed a Motion for Stay of Execution requesting a stay of the Order Denying in Part and Granting in Part Petition for Reconsideration, *nunc pro tunc*. On December 16, 1998, the Hearing Clerk

transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay of Execution.

Respondent states in his Motion for Stay of Execution that the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], "has no objection to the granting of [a Stay] Order." On December 16, 1998, counsel for Complainant informed the Office of the Judicial Officer that Complainant does not oppose Respondent's Motion for Stay of Execution.

Respondent's Motion for Stay of Execution is granted. The Order issued in this proceeding on July 7, 1998, *In re C.C. Baird*, 57 Agric. Dec. ___ (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.), is stayed, *nunc pro tunc*.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Lifting Stay and Modified Order filed December 18, 1998.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 20, 1998, I issued a Decision and Order: (1) concluding that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the Regulations and Standards issued under the Animal Welfare Act; (2) assessing Respondent a civil penalty of $9,250; (3) suspending Respondent's Animal Welfare Act license for 14 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. *In re C.C. Baird*, 57 Agric. Dec. 127, 149, 184-85 (1998). Respondent filed a timely petition for reconsideration which automatically stayed the March 20, 1998, Decision and Order. I issued an Order Denying in Part and Granting in Part Petition for Reconsideration, in which the Order issued March 20, 1998, was not reinstated and an Order (1) assessing Respondent a civil penalty of $5,350, (2) suspending Respondent's Animal Welfare Act license for 10 days, and (3) ordering Respondent to cease and desist from

violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, was issued. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. 18-21 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.).

On December 16, 1998, Respondent filed a Motion for Stay of Execution requesting a stay of the Order Denying in Part and Granting in Part Petition for Reconsideration, *nunc pro tunc*, and on December 17, 1998, I granted Respondent's Motion for Stay of Execution. *In re C.C. Baird*, 57 Agric. Dec. ___ (Dec. 17, 1998) (Stay Order).

On December 16, 1998, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], and Respondent filed a joint Motion to Lift Stay and Modify Suspension. On December 16, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's and Respondent's joint Motion to Lift Stay and Modify Suspension.

Complainant's and Respondent's December 16, 1998, joint Motion to Lift Stay and Modify Suspension is granted. The Stay Order issued December 17, 1998, *In re C.C. Baird*, 57 Agric. Dec. ___ (Dec. 17, 1998) is lifted, and the Order issued in *In re C.C. Baird*, 57 Agric. Dec. ___ (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.), is modified as set forth in Complainant's and Respondent's joint Motion to Lift Stay and Modify Suspension, as follows:

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and, in particular, shall cease and desist from:

A. Failing to make, keep, and maintain records which fully disclose all required information;

B. Acquiring random source dogs from unauthorized sources; and

C. Failing to make provision for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $5,350. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to: Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building,

1400 Independence Avenue, SW, Washington, D.C. 20250-1417. Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 95-0017.

3. Respondent's Animal Welfare Act license is suspended for 14 days from December 19, 1998, through January 1, 1999, inclusive.

In re: SEVERIN PETERSON AND SHARON PETERSON.
EAJA-FSA Docket No. 99-0002.
Order Denying Late Appeal filed November 9, 1998.

Late appeal — EAJA application.

The Judicial Officer denied Applicants' late-filed appeal. The Judicial Officer has no jurisdiction to consider Applicants' appeal filed after Hearing Officer Michael W. Shea's Equal Access to Justice Act Application Determination became final. The Rules of Practice require that within 30 days after receiving service, a party may appeal by filing an appeal petition with the Hearing Clerk (7 C.F.R. § 1.145(a)) and 7 C.F.R. § 1.147(g) provides that any document authorized under the Rules of Practice to be filed, shall be deemed to be filed at the time it reaches the Hearing Clerk. Neither Applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' appeal petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk.

Dustan J. Cross, New Ulm, Minnesota, for Applicants.
Margit Halvorson, for Respondent.
Initial decision issued by Michael W. Shea, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Severin Peterson and Sharon Peterson [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by sending a letter, dated April 1, 1998 [hereinafter EAJA Application], to Mr. Michael W. Shea, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter Hearing Officer].

Applicants allege in their EAJA Application that: (1) the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], initially denied Applicants' entitlement to benefits for 1994 under the Disaster Payment Program for 1990 and Subsequent Crop Years [hereinafter the Disaster Payment Program]

(EAJA Application at 2); (2) after Applicants established their entitlement to benefits for 1994 under the Disaster Payment Program, Respondent substantially understated the amount of the benefits to which Applicants were entitled, and on July 16, 1997, Respondent took the position that Respondent's method of calculating the Applicants' 1994 benefits under the Disaster Payment Program was not appealable (EAJA Application at 4-5); (3) on November 7, 1997, the National Appeals Division, United States Department of Agriculture, concluded that Applicants have a right to appeal Respondent's method of calculating benefits due to Applicants for 1994 under the Disaster Payment Program (EAJA Application at 5); (4) on February 5, 1998, the Hearing Officer issued a determination that Respondent erred in its method of calculating benefits to which Applicants are entitled for 1994 under the Disaster Payment Program (EAJA Application at 5); (5) Respondent's positions regarding Applicants' entitlement to benefits for 1994 under the Disaster Payment Program were not substantially justified (EAJA Application at 2, 6); (6) Applicants are prevailing parties with respect to their request for benefits for 1994 under the Disaster Payment Program (EAJA Application at 6); (7) Applicants incurred attorney fees and other expenses totaling $5,637.65, in connection with the Applicants' appeals for benefits for 1994 under the Disaster Payment Program (EAJA Application at 1, 8); and (8) Applicants' net worth does not exceed $2,000,000 and Applicants do not employ more than 500 persons (EAJA Application at 7). Applicants request that the Hearing Officer issue an order directing Respondent to pay $5,637.65 to Applicants for attorney fees and other expenses which Applicants allege they incurred in connection with appeals for benefits for 1994 under the Disaster Payment Program (EAJA Application at 1, 8).

On April 23, 1998, Respondent issued Government's Answer to Application for Fees Under the Equal Access to Justice Act [hereinafter Answer]: (1) stating that it is not yet known whether Applicants are prevailing parties under the Equal Access to Justice Act, because Applicants' benefits for 1994 under the Disaster Payment Program have not yet been recalculated and it is not known whether the recalculation will result in Applicants' receiving greater benefits than those to which they were originally determined to be entitled (Answer at 4); (2) stating that Respondent's position regarding the method to calculate Applicants' benefits for 1994 under the Disaster Payment Program was substantially justified (Answer at 4-7); and (3) stating that the adversary adjudication at issue in this proceeding was instituted by Respondent's March 20, 1996, "adverse determination" advising Applicants of the amount of disaster payments for 1994 to which they were entitled and that if Applicants are entitled to any fees and expenses under the Equal Access to Justice Act incurred in connection with the Applicants' appeals for benefits for

1994 under the Disaster Payment Program, they are only entitled to those fees and expenses incurred on and after March 20, 1996 (Answer at 7). Respondent requests that the Applicants' EAJA Application be denied (Answer at 8).

The Hearing Officer presided over an evidentiary hearing on June 18, 1998, in Shakopee, Minnesota. Mr. Dustan J. Cross, Gislason, Dosland, Hunter & Malecki, P.L.L.P., New Ulm, Minnesota, represented Applicants, and Ms. Margit Halvorson, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On August 13, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicants' April 1, 1998, EAJA Application and Respondent's April 23, 1998, Answer were timely filed (Initial Decision and Order at 1); (2) found that Applicants are prevailing parties with respect to the disputed benefits for 1994 under the Disaster Payment Program (Initial Decision and Order at 3); (3) found that Respondent's actions and positions regarding the method of calculating Applicants' benefits for 1994 under the Disaster Payment Program were reasonable and substantially justified (Initial Decision and Order at 4); and (4) determined that since Respondent's actions and decision were substantially justified, the question of whether Applicants' fees and expenses are reasonable and justified is moot (Initial Decision and Order at 4-5).

On October 14, 1998, Applicants appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer on matters pertaining to the Equal Access to Justice Act in United States Department of Agriculture [hereinafter USDA] proceedings covered by the EAJA Rules of Practice (7 C.F.R. § 1.189).[1] On November 2, 1998, Respondent filed Response to Letter Petition for Review, and on November 3, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include

written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. II 1996).

Applicants assert that their attorney received the Initial Decision and Order on August 17, 1998, and that their appeal "is well within the 35 days for appeal provided for in 7 C.F.R. § 1.201(a)" (Letter dated September 16, 1998, to Regional Director, National Appeals Division, from Dustan J. Cross [hereinafter Appeal Petition] at 1).

I disagree with Applicants' contention that their Appeal Petition was timely filed. The Initial Decision and Order states, as follows:

> . . . If neither party seeks a review of this decision, it shall become a final decision of the Department 35 days after it is served upon the Applicant.
>
> A review of this decision must be requested in accordance with the provisions of 7 CFR 1.145 and 7 CFR 1.146.

Initial Decision and Order at 5.

Section 1.201(a) of the EAJA Rules of Practice provides, as follows:

> **§ 1.201 Department review.**
>
> (a) Except with respect to a proceeding covered by § 1.183(a)(1)(ii) of this part, either the applicant or agency counsel may seek review of the initial decision on the fee application, in accordance with the provisions of §§ 1.145(a) and 1.146(a) of this part. If neither the applicant nor agency counsel seeks review, the initial decision on the fee application shall become a final decision of the Department 35 days after it is served upon the applicant. If review is taken, it will be in accord with the provisions of §§ 1.145(b) through (i) and 1.146(b) of this part.

7 C.F.R. § 1.201(a).

Section 1.145(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides that:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may

> appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

On October 14, 1998, 58 days after Applicants admit that they were served with the Initial Decision and Order, Applicants filed Applicants' Appeal Petition with the Hearing Clerk.[2] For the reasons set forth below, Applicants' Appeal Petition must be rejected as untimely.

In accordance with 7 C.F.R. § 1.201(a), the Initial Decision and Order became the final decision of USDA on September 21, 1998, 35 days after service on Applicants. Applicants' Appeal Petition, filed with the Hearing Clerk on October 14, 1998, was not filed within 35 days after service of the Initial Decision and Order on Applicants.[3] It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that

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[2]On October 13, 1998, the National Appeals Division provided the Office of the Judicial Officer with a file concerning the instant proceeding. After reviewing the file, I determined that it contained, *inter alia*, the original of Applicants' Appeal Petition. I then contacted the Hearing Clerk's office which informed me that neither Applicants nor Respondent had filed any documents in this proceeding and there was no record of this proceeding having been docketed with the Hearing Clerk. On October 14, 1998, I filed the entire file provided to the Office of the Judicial Officer by the National Appeals Division, including Applicants' Appeal Petition, with the Hearing Clerk.

[3]The record establishes that Applicants sent their Appeal Petition, dated September 16, 1998, to the Regional Director, National Appeals Division, 3500 DePauw Boulevard, Suite 2052, Indianapolis, Indiana 46268-0978, and that the Appeal Petition was received by the National Appeals Division, Eastern Regional Office, Indianapolis, Indiana, at 2:54 p.m., September 18, 1998 (Appeal Petition at 1). Section 1.145(a) of the Rules of Practice requires that appeal petitions must be filed with the Hearing Clerk (7 C.F.R. § 1.145(a)) and section 1.147(g) of the Rules of Practice provides that "[a]ny document . . . required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk" (7 C.F.R. § 1.147(g)). Neither Applicants' act of mailing the Appeal Petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' Appeal Petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk. Moreover, the National Appeals Division's act of delivering Applicant's Appeal Petition to the Office of the Judicial Officer does not constitute filing with the Hearing Clerk. *Cf. In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the hearing clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

is filed after an initial decision and order becomes final.[4] Therefore, the Judicial Officer no longer has jurisdiction to consider Applicants' Appeal Petition.

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

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[4]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. ___ (May 13, 1998) (dismissing respondent's appeal, filed 58 days after the Initial Decision and Order became final), *appeal docketed*, No. 98-1991 (1st Cir. Sept. 10, 1998); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became final); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became final); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .[5]

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[5]*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *reh'g denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[6]

Accordingly, Applicants' Appeal Petition must be denied since it is too late for the matter to be further considered.

For the foregoing reasons, the following Order should be issued.

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[6] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

Order

Applicants' Appeal Petition, filed October 14, 1998, is denied. The Equal Access to Justice Act Application Determination, issued by Hearing Officer Michael W. Shea on August 13, 1998, is the final Decision and Order in this proceeding.

In re: EVERFLORA, INC., FCFGPIA Docket No. 97-0001.
In re: FERRIS BROTHERS, INC., FCFGPIA Docket No. 97-0002.
In re: SUBURBAN WHOLESALE FLORISTS, INC., FCFGPIA Docket No. 97-0003.
In re: DUTCH FLOWER LINE, INC., FCFGPIA Docket No. 97-0004.
In re: FRANK W. MANKER WHOLESALE GROWER, INC., FCFGPIA Docket No. 97-0005.
In re: QUALITY WHOLESALE FLORIST, INC., FCFGPIA Docket No. 97-0006.
In re: HENRY C. ALDERS WHOLESALE, INC., FCFGPIA Docket No. 97-0007.
In re: HARRY M. VLACHOS, INC., FCFGPIA Docket No. 97-0008.
In re: MUELLER BROTHERS, INC., FCFGPIA Docket No. 97-0009.
In re: U.S. EVERGREENS, INC., FCFGPIA Docket No. 97-0010.
In re: GEORGE RALLIS, INC., FCFGPIA Docket No. 97-0011.
In re: MAJOR WHOLESALE FLORIST, INC., FCFGPIA Docket No. 97-0012.
In re: EVERFLORA-MIAMI, INC., FCFGPIA Docket No. 97-0013.
In re: HOLLAND FLOWER EXPRESS, INC., FCFGPIA Docket No. 97-0014.
Ruling Denying Respondents' Motion for Extension of Time filed August 6, 1998.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On June 29, 1998, Respondents in the above-captioned proceedings jointly requested that the time for filing appeal petitions be extended to August 3, 1998. On June 30, 1998, I granted Respondents' joint request and extended the time for

filing Respondents' appeal petitions to August 3, 1998. At 10:15 a.m., on August 4, 1998, Respondents in the above-captioned proceedings filed Consent Motion for Extension of Time to File Appeal [hereinafter Motion for Extension of Time] jointly requesting an extension of time, to September 7, 1998, within which to file appeal petitions in the above-captioned proceedings.[1]

Respondents' August 4, 1998, Motion for Extension of Time is denied. Chief Administrative Law Judge Palmer's [hereinafter Chief ALJ] decisions in the above-captioned proceedings[2] became final at 4:01, p.m., August 3, 1998,[3] prior to Respondents' filing Respondents' Motion for Extension of Time.

It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.[4]

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[1]The date and time on which Respondents filed Respondents' Motion for Extension of Time is evidenced by the date and time stamped by the Office of the Hearing Clerk on the first page of Respondents' Motion for Extension of Time.

[2]*In re Everflora, Inc.*, FCFGPIA Docket No. 97-0001 (May 22, 1998); *In re Ferris Bros., Inc.*, FCFGPIA Docket No. 97-0002 (May 22, 1998); *In re Suburban Wholesale Florists, Inc.*, FCFGPIA Docket No. 97-0003 (May 22, 1998); *In re Dutch Flower Line, Inc.*, FCFGPIA Docket No. 97-0004 (May 22, 1998); *In re Frank W. Manker Wholesale Grower, Inc.*, FCFGPIA Docket No. 97-0005 (May 22, 1998); *In re Quality Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0006 (May 22, 1998); *In re Henry C. Alders Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0007 (May 22, 1998); *In re Harry Vlachos, Inc.*, FCFGPIA Docket No. 97-0008 (May 22, 1998); *In re Mueller Bros., Inc.*, FCFGPIA Docket No. 97-0009 (May 22, 1998); *In re U.S. Evergreens, Inc.*, FCFGPIA Docket No. 97-0010 (May 22, 1998); *In re George Rallis, Inc.*, FCFGPIA Docket No. 97-0011 (May 22, 1998); *In re Major Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0012 (May 22, 1998); *In re Everflora-Miami, Inc.*, FCFGPIA Docket No. 97-0013 (May 22, 1998); and *In re Holland Flower Express, Inc.*, FCFGPIA Docket No. 97-0014 (May 22, 1998).

[3]The Office of the Hearing Clerk closes for the purpose of filing documents in proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter Rules of Practice] at 4:00 p.m. Therefore, Respondents' failure to file their Motion for Extension of Time on or before 4:00 p.m., August 3, 1998, resulted in the Chief ALJ's decisions becoming final at 4:01 p.m., August 3, 1998. (*See In re Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (1998) (denying complainant's motion for an extension of time to file a response to respondent's appeal because complainant's response was due September 26, 1997, and complainant's motion was orally submitted to the Judicial Officer at 4:13 p.m., September 26, 1997, 13 minutes after the Office of the Hearing Clerk closed).)

[4]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal filed 63 days after the Initial decision and Order became effective); *In re Gail Davis*, 56 Agric. Dec. 373 (continued...)

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

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[4](...continued)
(1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .[5]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district

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[5] *Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[6]

Accordingly, Respondents' Motion for Extension of Time is denied, since any appeal petitions filed in the above-captioned proceedings would be too late to be considered.

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[6] *Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

In re: OTTO WAGNER, JR.
FCIA Docket No. 98-0005.
Order Dismissing Disqualification Proceeding filed July 14, 1998.

Donald McAmis, for Complainant.
Tom Wilkins, McAllen, TX, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Counsels for Complainant and Respondent have filed a Joint Stipulation for Dismissal. The disqualification proceeding, *In re Otto Wagner, Jr.*, FCIA Docket Number 98-0005, is hereby dismissed.

In re: ROBERT SKLOSS, d/b/a ROBERT A. SKLOSS and B&A FARMS.
FCIA Docket No. 98-0012.
Order Dismissing Disqualification Proceeding filed July 14, 1998.

Donald McAmis, for Complainant.
Tom Wilkins, McAllen, TX, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Counsels for Complainant and Respondent have filed a Joint Stipulation for Dismissal. The disqualification proceeding, *In re Robert Skloss, d/b/a Robert A. Skloss and B&A Farms*, FCIA Docket Number 98-0012, is hereby dismissed.

In re: RAYMOND J. FULLER.
FCIA Docket No. 97-0008.
Order filed August 12, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The Complainant, Federal Crop Insurance Corporation, and Respondent, Raymond J. Fuller, having jointly moved that the disqualification action of Raymond J. Fuller, FCIA Docket No. 97-0008, be dismissed. It is so ordered.

In re: JAMES L. AULT.
FCIA Docket No. 98-0014.
Order of Dismissal filed November 12, 1998.

Donald McAmis, for Complainant.
Barry M. Barash, Galesburg, Il, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

On November 9, 1998, the parties filed a "Joint Stipulation for Dismissal." It is ordered that the Complaint, filed herein on July 23, 1998, is dismissed.

In re: HAWAIIAN MACADAMIA PLANTATION, INC.
P.Q. Docket No. 98-0011.
Complaint Dismissal filed August 12, 1998.

Howard Levine, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Motion therefor, filed August 10, 1998, the Complaint in the above entitled cause is hereby Dismissed.

Copies hereof shall be served upon the parties.
